SEP 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1735

IN THE
Supreme Court of the United States
October Term, 1988

BILLY RAY APPERSON,

Petitioner,

vs.

FLEET CARRIER CORP.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ellis Boal
(Counsel of Record)
925 Ford Building
Detroit, MI 48226
(313) 962-2770

Delmer C. Gowing, III
May, Gowing, Simpson & Strote
100 West Long Lake Road
Box 541 Suite 200
Bloomfield Hills, MI 48013
(313) 646-9500

Attorneys for Petitioner

September 5, 1989

THE CASILLAS PRESS, INC. WASHINGTON, D.C. 20036 (202) 223-1220

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

REPLY 1

A. The Pleadings Below Provide An Appropriate Vehicle For Considering The Question Presented 2

B. No Other Issue Is Before This Court, And In Any Event There Is No Other Ground On Which To Affirm The District Court 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Del Costello v. Teamsters,
462 U.S. 151 (1983) 4, 5

Dogherra v. Safeway Stores,
679 F.2d 1293 (9th Cir. 1982) 3

Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electrical Corp.,
736 F.2d 896 (3rd Cir. 1984) 5

International Union of Electrical Workers v. Ingram Mfg. Co.,
715 F.2d 866 (1st Cir. 1983) 5

Occidental Chemical Corp. v. Local 820, International Chemical Workers Union,
853 F.2d 1310 (6th Cir. 1988) 5

Scott v. Anchor Motor Freight,
496 F.2d 276 (6th Cir. 1974), *cert. den.*,
419 U.S. 868, 997 (1974) 3

Page

Smith v. Evening News Association,
71 U.S. 195 (1962) 5

Smith v. Pittsburgh Gage & Supply Co.,
64 F.2d 870 (3d Cir. 1972) 2-3, 5

Wm. E. Arnold Co. v. Carpenters District Council,
17 U.S. 12 (1974) 5

Yates v. Yellow Freight Systems,
501 F. Supp. 101 (S.D. Ohio, 1980) 2, 5

Statutes:

Labor Management Relations Act,
29 U.S.C. § 141, *et seq.* ..... *passim*

National Labor Relations Act,
29 U.S.C. § 160(b) 4

United States Arbitration Act,
9 U.S.C. § 12 ..... 4, 5

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1735

BILLY RAY APPERSON,

Petitioner,

vs.

FLEET CARRIER CORP.,

Respondent,

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY

Respondent disputes neither that there is a conflict in the circuits, nor that this case presents important policy issues. Rather it asserts that this case is a poor vehicle, and the case can be decided in its favor on other grounds. Petitioner will respond briefly to each point.

A. The Pleadings Below Provide An Appropriate Vehicle For Considering The Question Presented

Respondent acknowledges "conflict" arising out of the court of appeals' decision, but asserts that it is more apparent than real because of the semantics used by Petitioner below. It further argues that this case presents unique facts. (Respondent's Brief, 5, 6)

The question presented is:

> "May an individual union member sue to [1] vacate an arbitration award *and* [2] enforce a collective bargaining agreement, where the union has represented him fairly before the arbitral panel, but members of the arbitral panel were biased against him and/or the employer's conduct in the arbitration amounted to repudiation of the contract grievance procedure?" (emphasis and interlineation added)

Respondent misconceives the question in asserting that the sole question presented is merely "whether an action by an individual *to vacate* ***an arbitration award*** . . . can be maintained . . .." (Respondent's Brief, 4) Indeed if Petitioner succeeded merely in vacating the arbitral panel's decision in his case, that would afford him no material relief. He must also positively enforce the contract in order to resecure his employment.

To achieve this, the district court would have discretion either to order resubmission of his contract claim to a new arbitration panel supervised by the court, *Yates v. Yellow Freight Systems*, 501 F. Supp. 101 (S.D. Ohio, 1980), or to construe the contract itself and order relief. *Smith v. Pittsburgh*

Gage & Supply Co., 464 F.2d 870 (3d Cir. 1972); *Dogherra v. Safeway Stores*, 679 F.2d 1293 (9th Cir. 1982).

Similarly in ordinary "hybrid" cases, where an individual sues a company to enforce a collective bargaining agreement and a union for breach of duty,[1] the district court has the option of itself resolving the merits of the underlying contract claim. *See e.g. Scott v. Anchor Motor Freight*, 496 F.2d 276 (6th Cir. 1974), *cert. den.* 419 U.S. 868, 997 (1974).

In the court of appeals Petitioner suggested that a case such as the present could possibly be regarded as a "hybrid" despite there being no claim of unfair union representation, because as in ordinary "hybrids" he must first show the grievance procedure was tainted before he can proceed to enforce the contract. But he was careful to note that his case "should not stand or fall on a semantic distinction not made by statute." (Appellant's Brief, 10)

Rather, the real issue was whether a claim had been stated (regardless what it was called). The court of appeals majority answered "no." Without using the term "hybrid," this Court and other courts of appeals have said "yes." See Petition at 7-10. The majority below was not confused by semantics. It simply rejected the reasoning of the other courts.

As to the claimed "uniqueness" of the facts here, they are no more unique than those in the cited cases which have allowed claims such as Petitioner's to proceed.

Accordingly a clean issue is presented to this Court for resolution.

---

[1]See *e.g.*, cases cited in the Petition 7 n.3.

B. No Other Issue Is Before This Court, And In Any Event There Is No Other Ground On Which To Affirm The District Court

Respondent alternatively argues that the district court's decision can be affirmed on the basis of the three-month limitation of the United States Arbitration Act, 9 U.S.C. § 12. (Respondent's Brief, 6-7) Neither the majority nor dissent below addressed this contention. Absent a cross-petition this issue is improperly before this Court.

But should the Court wish to consider it Petitioner will briefly summarize his position as presented to the court of appeals. It arises from the dual nature of the claim set out in the complaint and in the Question Presented.

Though as discussed above this case is not an ordinary "hybrid" and may not be a "hybrid" at all, the "hybrid" case law provides a ready analogy to this for time-bar purposes. *Del Costello v. Teamsters*, 462 U.S. 151 (1983) applied the six-month time limitation of Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), to "hybrid" cases. In rejecting a three-month arbitration limitation, *Del Costello* emphasized that unlike parties to a commercial arbitration, individual employee plaintiffs are often unsophisticated. They are called on within the limitations period to evaluate the adequacy of the union's representation, retain counsel, investigate matters which were not at issue in the arbitration, and frame the suit. 462 U.S. at 165-66. *Del Costello* also saw a "family resemblance" between the union's obligation under the N.L.R.A. and the federal common law of fair representation. 462 U.S. at 170. And it noted that the employer's contract breach may also amount to an unfair labor practice. *Id.*

All of these considerations apply with equal force here. Petitioner was an individual employee and had to hire a lawyer.

He had to evaluate the adequacy of arbitral panel members, which was not at issue in the arbitration,[2] and frame the suit. He had to investigate the union's conduct for a possible breach of duty. And the company's action here bore a "family resemblance" to an unfair labor practice.[3]

Finally, application of a different time-limit would cut against the principle of uniform accrual and tolling dates in employee actions against employers and unions. *Del Costello, supra*, 462 U.S. at 169 n.19. For instance if Petitioner's investigation had disclosed both a breach by the union and misconduct by the arbitrators (as in *Yates, supra*), or both a union breach and company repudiation (as in *Smith v. Pittsburgh Gage & Supply Co., supra*), the district court's ruling would require application of different three- and six-month limitation periods to each claim.[4]

---

[2]The grievance procedure did not permit or acknowledge the ability of a grievant to challenge the committee's ability to render a fair decision. (Complaint § 13(b))

[3]Fleet itself suggested this in its seventh affirmative defense urging N.L.R.A. preemption of certain complaint allegations. See Complaint §§ 5(e), 5(f), 13(c). Despite the resemblance the claims are not preempted. *Smith v. Evening News Association*, 371 U.S. 195, 197 (1962); *Wm. E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12 (1974).

[4]If the Court rejects the above analogy to "hybrid" cases, the question of the proper limitation is an open question. *Del Costello, supra*, 462 U.S. at 158, n.12; *Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electrical Corp.*, 736 F.2d 896 (3rd Cir. 1984). *See, e.g., Occidental Chemical Corp. v. Local 820, International Chemical Workers Union*, 853 F.2d 1310 (6th Cir. 1988) (three-month limitation of United States Arbitration Act); *International Union of Elecrical Workers v. Ingram Mfg. Co.*, 715 F.2d 866 (1st Cir. 1983) (state statute of limitations).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ellis Boal
(Counsel of Record)
925 Ford Building
Detroit, MI 48226
(313) 962-2770

Delmer C. Gowing, III
May, Gowing, Simpson & Strote
100 West Long Lake Road
Box 541 Suite 200
Bloomfield Hills, MI 48013
(313) 646-9500

Attorneys for Petitioner

September 5, 1989